

**MS Piling & Trading Sdn Bhd v Pembinaan Wincon Sdn Bhd
& Ors**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCVC)(W)-1465-06 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH
WENG KWAI JJCA
16 MAY 2014

Contract — Repudiation — Acceptance — Whether mere silence could amount to repudiation — Whether contracting party must demonstrate absolute refusal to perform for innocent party to consider itself discharged of obligations — Whether no overt act existed for court to conclude there was repudiation — Whether contracting party's disposal of majority shares in company instrumental for securing project was not act of repudiation — Whether sale of shares was not assignment of project to third party and did not affect contractual relationship between parties — Whether agreement to sell off shares in wholly-owned subsidiary did not mean directors of parent company were guilty of fraudulent trading within meaning of s 304 of the Companies Act 1965

Subsidiary Company ('WDPL') wholly owned by the first respondent ('Wincon') had obtained a contract to construct 25,000 units of mixed residential dwellings in Sri Lanka ('the project'). To carry out the project, Wincon entered into an agreement with the appellant for the latter to fabricate and supply pre-cast reinforced concrete piles to Wincon's project site in Sri Lanka over a period of five years. Pursuant to the agreement, the appellant set up its plant at the project site and commenced operations but stopped work because the quality of ready-mixed concrete supplied by Wincon was allegedly unsuitable for the piles to be made. Wincon then entered into a second agreement with the appellant under which it agreed to supply ready-mixed concrete of a particular grade as well as steel bars for the appellant to continue producing the piles. The appellant resumed operations but again stopped work after several months claiming Wincon had failed to deliver the necessary materials for the piles to be made. Following this second stoppage in works, the bulk of the appellant's work-force at the project site in Sri Lanka returned to Malaysia for the Chinese New Year holidays and never returned to the work site. Neither did Wincon request the appellant to return its workers to the project site to continue producing the piles. Considering Wincon's silence to be a repudiation of the two agreements, the appellant sued Wincon in the High Court for loss and damages claiming that under the agreements the failure to complete the 25,000 units of dwellings entitled the appellant to claim for loss of profits and overheads incurred. The appellant also sued the second and third respondents (who were the sole directors of Wincon) for fraudulent trading

- A under s 304 of the Companies Act 1965, alleging that by causing Wincon to sell off its majority shares in WDPL to another entity ('Metacorp Bhd'), Wincon had effectively 'sold off' the project to Metacorp Bhd and thus caused loss to the appellant. In its defence, Wincon, inter alia, denied that it had repudiated the agreements and contended that because of the appellant's failure to fully perform its obligations thereunder, Wincon had to incur additional expense to engage another contractor to complete the works. Wincon counterclaimed for the cost of materials it had supplied, and monetary advances it had made, to the appellant. The second and third respondents denied they had engaged in any fraudulent trading. The instant appeals were against the High Court's dismissal of the appellant's claim and of Wincon's counterclaim.

Held, dismissing the appellant's appeal and allowing Wincon's appeal:

- D (1) The lack of instruction from Wincon to the appellant to resume the works in Sri Lanka could not amount to a repudiation of the two agreements. The trial judge was correct to hold that 'mere silence' was insufficient to amount to repudiation and that the two agreements subsisted. For a contract to be repudiated there must be an absolute refusal to perform; only then could the innocent party treat itself as discharged. Here, there was no overt act committed by Wincon to suggest it had expressly refused to carry on with the two agreements and for the court to conclude that Wincon no longer intended to be bound by the terms of the agreements. Wincon was not in breach of the two agreements and had not repudiated them (see paras 39).
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- G (2) There was no correspondence whatsoever between the appellant and Wincon pertaining to any alleged repudiation/termination of the two agreements. Therefore, there was no question of the appellant accepting Wincon's alleged repudiation of them. It was most unusual and undesirable for the appellant to contend that it had accepted Wincon's purported repudiation by way of filing the writ of summons and statement of claim (see paras 43–44).
- H (3) Even with the disposal by Wincon of its shares in WDPL to Metacorp Bhd, it could not be said that Wincon did not intend to go through with its agreements with the appellant. Despite the sale of the shares, Wincon retained 25% of the shareholding in WDPL and remained as the contracting party in the two agreements. The sale of the shares in WDPL did not affect the contractual relationship between the appellant and Wincon. At no time was the share sales agreement an assignment of the project to Metacorp Bhd (see paras 49–51).
- I (4) The appellant had failed to adduce evidence to show how the sale of Wincon's shares in WDPL amounted to fraudulent trading by the second and third respondents within the scope and ambit of s 304 of the

Companies Act. There was no evidence to support the contention that the two directors had maliciously and intentionally caused Wincon to enter into contracts with an ulterior motive of commercially packaging the project for sale; neither was there evidence to show they had conspired to cause financial loss to the appellant (see paras 54 & 58).

[Bahasa Malaysia summary]

Syarikat subsidiari ('WDPL') yang dimiliki sepenuhnya oleh responden pertama ('Wincon') telah memperolehi kontrak untuk membina 25,000 unit rumah kediaman bercampur di Sri Lanka ('projek'). Untuk menjalankan projek ini, Wincon menandatangani perjanjian dengan perayu untuk yang kedua itu untuk memasang dan membekalkan cerucuk konkrit pra-tuang bertetulang ke tapak projek Wincon di Sri Lanka dalam tempoh lima tahun. Menurut perjanjian itu, perayu membina kilangnya di tapak projek dan memulakan operasi tetapi menghentikan kerja kerana kualiti konkrit siap campur dibekalkan oleh Wincon didakwa tidak sesuai untuk dibuat cerucuk. Wincon kemudian memasuki perjanjian kedua dengan perayu yang di bawahnya ia bersetuju untuk membekalkan konkrit siap campur bagi gred tertentu serta bar keluli untuk perayu untuk terus menghasilkan cerucuk. Perayu mula beroperasi tetapi sekali lagi menghentikan kerja selepas beberapa bulan mendakwa Wincon telah gagal untuk menghantar bahan-bahan yang perlu bagi cerucuk yang akan dibuat. Berikutan pemberhentian kedua dalam kerja-kerja, sebahagian besar daripada tenaga kerja perayu di tapak projek di Sri Lanka kembali ke Malaysia untuk cuti Tahun Baru Cina dan tidak kembali semula ke tapak kerja. Begitu juga Wincon tidak meminta perayu untuk menghantar semula pekerjaanya ke tapak projek untuk terus menghasilkan cerucuk. Mempertimbangkan Wincon berdiam diri untuk menjadi pembatalan kedua-dua perjanjian, perayu mendakwa Wincon di Mahkamah Tinggi bagi kerugian dan ganti rugi mendakwa bahawa di bawah perjanjian kegagalan untuk menyiapkan 25,000 unit kediaman memberikan hak kepada perayu menuntut kehilangan keuntungan dan overhead yang ditanggung. Perayu juga menyaman responden kedua dan ketiga (yang merupakan pengarah tunggal Wincon) untuk perdagangan penipuan di bawah s 304 Akta Syarikat 1965, yang mendakwa bahawa dengan menyebabkan Wincon menjual saham majoriti di WDPL kepada entiti lain ('Metacorp Bhd'), Wincon telah secara efektif 'sold off' projek kepada Metacorp Bhd dan dengan itu menyebabkan kerugian kepada perayu. Dalam pembelaannya, Wincon, antara lain, menafikan bahawa ia telah membatalkan perjanjian dan menegaskan bahawa kerana kegagalan perayu untuk melaksanakan sepenuhnya tanggungjawab di bawahnya, Wincon terpaksa menanggung perbelanjaan tambahan untuk mengupah kontraktor lain untuk menyiapkan kerja-kerja. Wincon menuntut balas untuk kos bahan yang telah dibekalkan, dan wang pendahuluan yang telah dibuat, kepada perayu. Responden kedua dan ketiga, menafikan bahawa mereka terlibat dalam apa-apa perdagangan penipuan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi menolak

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A tuntutan perayu dan tuntutan balas Wincon.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan Wincon:

- B (1) Kekurangan arahan daripada Wincon kepada perayu untuk menyambung semula kerja-kerja di Sri Lanka tidak boleh terjumlah kepada pembatalan kedua-dua perjanjian. Hakim perbicaraan adalah betul untuk memutuskan 'mere silence' tidak mencukupi untuk berjumlah kepada pembatalan dan bahawa kedua-dua perjanjian masih wujud. Bagi kontrak yang akan dibatalkan mesti ada satu keengganan mutlak untuk melaksanakan; barulah pihak yang tidak bersalah boleh menganggap dirinya dilepaskan. Di sini, tidak ada tindakan yang jelas yang dilakukan oleh Wincon mencadangkan ia nyata enggan untuk meneruskan dengan dua perjanjian dan adalah atas mahkamah untuk membuat kesimpulan bahawa Wincon tidak lagi bertujuan untuk terikat dengan syarat-syarat perjanjian. Wincon tidak melanggar dua perjanjian tersebut dan tidak membatalkan kedua-duanya (lihat perenggan 39).
- E (2) Tiada surat-menyurat apa sekalipun antara perayu dan Wincon berkaitan dengan apa-apa pembatalan/penamatan dua perjanjian yang didakwa. Oleh itu, tidak ada persoalan perayu menerima pembatalan yang dikatakan oleh Wincon ini daripada mereka. Ia bukanlah paling luar biasa dan yang tidak diingini untuk perayu menegaskan bahawa ia telah menerima pembatalan yang dikatakan Wincon dengan memfailkan writ saman dan pernyataan tuntutan (lihat perenggan 43–44).
- F (3) Walaupun dengan penjualan sahamnya oleh Wincon di WDPL untuk Metacorp Bhd, ia tidak boleh mengatakan Wincon tidak berniat untuk meneruskan perjanjian dengan perayu. Walaupun penjualan saham, Wincon dikekalkan 25% daripada pegangan saham dalam WDPL dan kekal sebagai pihak kontrak dalam kedua-dua perjanjian. Penjualan saham di WDPL tidak menjejaskan hubungan secara kontrak antara perayu dan Wincon. Tidak ada pada bila-bila masa perjanjian jualan saham adalah penyerahhakan projek kepada Metacorp Bhd (lihat perenggan 49–51).
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- H (4) Perayu telah gagal untuk mengemukakan keterangan untuk menunjukkan bagaimana penjualan saham Wincon dalam WDPL berjumlah kepada perdagangan penipuan oleh responden kedua dan ketiga dalam skop dan bidang kuasa s 304 Akta Syarikat. Tidak ada keterangan untuk menyokong pendapat bahawa dua orang pengarah telah dengan niat jahat dan sengaja menyebabkan Wincon untuk memasuki kontrak dengan motif tersembunyi untuk secara komersial mendapatkan projek untuk jualan; tiada juga keterangan yang menunjukkan mereka telah bersekongkol untuk menyebabkan kerugian kewangan kepada perayu (lihat perenggan 54 & 58).]
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Notes

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For cases on acceptance, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5946–5948.

Cases referred to

B

Lee Soo You (trading under the name and style of AK Piling Construction) v Pembinaan Wincon Sdn Bhd [2014] 5 MLJ 522, CA (refd)

Malayawata Steel Berhad v Government of Malaysia & Anor [1980] 2 MLJ 103; [1980] 1 LNS 45, PC (refd)

Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569; [2003] 4 CLJ 68, CA (refd)

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WH Electrical Marketing (M) Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors [2010] MLJU 1814; [2011] 4 CLJ 276, CA (refd)

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Legislation referred to

Companies Act 1965 s 304

Appeal from: Civil Suit No S22 NCV-594 of 2011 (High Court, Kuala Lumpur)

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Balbir Singh (Ho Hon Keong with him) (Najiana Wan Balbir & Assoc) for the appellant.

Harcharan Singh (Harcharan Singh Sidhu & Assoc) for the respondents.

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Mah Weng Kwai JCA (delivering judgment of the court):**BRIEF BACKGROUND FACTS**

[1] In 2003/2004 Wincon Development (Ceylon) Pte Ltd, a wholly owned subsidiary of the first respondent was awarded a contract to construct and complete 25,000 units of mixed residential dwellings in the Republic of Sri Lanka ('the project').

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[2] By a written agreement dated 13 April 2004 (the first agreement) entered into between the appellant and the first respondent, the appellant was appointed as a sub-contractor to fabricate and supply Precast Reinforced Concrete Piles ('the RC Piles') to the first respondent at the first respondent's project site in Sri Lanka for a period of five years.

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[3] The appellant set up its plant in June 2004 and commenced operations. However, due to the inconsistency in the quality of the ready-mixed concrete supplied by the first respondent, the appellant was unable to carry on the fabrication of the RC Piles and work was stopped.

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A [4] The appellant and the first respondent then entered into another written agreement dated 12 November 2004 ('the second agreement'), wherein the first respondent agreed to supply and deliver ready-mixed concrete of Grade 45 and steel bars to the appellant at the appellant's plant in Sri Lanka for the appellant to carry out the RC Piles works.

B [5] Both agreements were firm price contracts for the duration of the contracts. Except for variations in the price of materials supplied by the first respondent, the prices in the agreements were not subject to fluctuations in wages, emoluments and expenses.

C [6] After the second agreement was signed, the appellant mobilised its equipment in Malaysia for shipment to Sri Lanka through the first respondent. The appellant recommenced operations in Sri Lanka by June 2005.

D [7] However, by mid January 2006, the first respondent failed to deliver the necessary materials to the appellant for the production of the ready-mixed concrete. Production work stopped and the appellant's staff returned to Malaysia for the Chinese New Year holidays. The appellant maintained two of its staff members at the first respondent's site.

E [8] Both agreements contained a termination clause which provided for a termination of the agreements in the event one or more of the following events occurred:

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- (a) bankruptcy or insolvency of either party;
 - (b) failure to comply with the terms of the contract;
 - (c) without reasonable cause either party fails to commence work in accordance to the contract;
 - (d) assignment of the contract without either party's consent; and
 - (e) in the event the employer's employment is determined.
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H [9] As the appellant had no financial means to carry out their obligations under the two agreements, the first respondent had provided financial assistance to the appellant throughout the duration of the contracts.

I [10] The appellant was paid progress claim Nos 1–5 by the first respondent, which is not in dispute. The payments were by way of set off against the advances made by the first respondent to the appellant.

[11] Payment for progress claim No 6 was disputed by the appellant.

THE APPELLANT’S CLAIM A

[12] The appellant sued the first respondent for loss and damages relying on cl 11 of the first agreement and cl 12 of the second agreement which provide:

In the event of this contract could be achieved 25,000 units, MS Piling has agreed not to claim any loss of profit and overhead. B

[13] The appellant contended that the first agreement was entered into upon the first respondent’s representation that the first respondent would construct and complete not less than 25,000 units of mixed residential dwellings and in the event the target number is not achieved the appellant would be entitled to claim for loss of profits and overheads. C

[14] The appellant contended that despite numerous inquiries made, the first respondent never instructed the appellant to return to Sri Lanka to continue with the RC Piles works and to reactivate the two agreements. D

[15] The appellant further contended that by the sale of the first respondent’s shares in Wincon Development (Ceylon) Pte Ltd, its subsidiary, to Metacorp Bhd in 2008, the project had been ‘sold’ to Metacorp Bhd, thus breaking their contractual obligations to the appellant. E

[16] The appellant claimed the sum of RM517,691.45 for the supply of RC Piles, ready-mixed concrete and cost of fixed assets at the casting and batching plant from February 2006 to February 2009 as well as damages for conversion and detainue of equipment, plant and batching at the casting and batching site belonging to the appellant. F

[17] The appellant’s claim against the second and third respondents was for fraudulent trading under s 304 of the Companies Act 1965 in their capacity as directors of the first respondent. The appellant contended that the second and third respondents being the only directors knew and/or ought to have known that the first respondent was at all material times negotiating to ‘sell’ the project to a third party yet the first respondent had entered into the two agreements with the appellant on the basis that the first respondent would be constructing not less than 25,000 units of residential dwellings in Sri Lanka over a period of five years thereby causing loss and damage to the appellant. G
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THE RESPONDENTS’ DEFENCE AND THE FIRST RESPONDENT’S COUNTERCLAIM I

[18] The first respondent denied that the appellant had mobilised its RC Piles fabricating equipment and staff at the site in Sri Lanka by April 2004 and

- A** that the second agreement was entered into not because of the inconsistency of the quality of the ready-mixed concrete supplied by the first respondent but because of the shortages of the ready-mixed concrete due to the tsunami in Sri Lanka in December 2003.
- B** [19] The first respondent alleged that they had supplied the iron bars to the appellant in Malaysia for the purpose of casting the 'mould' for the RC Piles for use in Sri Lanka. However, the appellant had 'misappropriated' the iron bars for its own use.
- C** [20] The first respondent contended that the appellant due to financial constraints was in fact incapable of continuing with the RC Piles works under the two agreements and had left the project site in Sri Lanka in January 2006, and that the appellant had failed to return to Sri Lanka to resume the works.
- D** [21] As a result of the appellant's failure to continue with its obligations, the first respondent had to engage another contractor to complete the works thereby having to bear addition cost and expense.
- E** [22] The first respondent alleged that despite numerous requests, the appellant had failed to meet up with the first respondent to settle the outstanding claims.
- F** [23] The first respondent further alleged that all equipment and machinery shipped to the Sri Lanka site in fact belonged to the first respondent and not to the appellant.
- G** [24] The first respondent counterclaimed for the sum of RM191,064.67 being the value of the iron bars delivered to the appellant for the purpose of casting the mould; the sum of RM53,263.58 being advances made and the sum of RM174,783.02 being miscellaneous expenses, thereby totalling RM419,111.27.
- H** [25] The second and third respondents denied there was any fraudulent trading on their part in breach of s 304 of the Companies Act.

DECISION OF THE HIGH COURT

- I** [26] In the course of the trial the following issues were considered and determined by the learned trial judge namely:
- (a) whether there was a repudiation of the two agreements by the first respondent;

- (b) whether the two agreements had been assigned to Metacorp Bhd by the first respondent without the consent of the appellant; A
- (c) whether the second and third respondents were liable for fraudulent trading under s 304 of the Companies Act; and
- (d) whether the first respondent had proved its counterclaim against the appellant. B

[27] At the close of trial, the learned trial judge dismissed the appellant's claim with costs. The first respondent's counterclaim was also dismissed with costs. C

THE APPEAL

[28] Being dissatisfied with the decision of the learned trial judge the appellant filed its notice of appeal to the Court of Appeal against the whole of the order. D

[29] The first respondent similarly filed an appeal against the decision of the learned trial judge dismissing the counterclaim with costs. E

DECISION OF THE COURT OF APPEAL

[30] The appeal in this case (case No 17 on the hearing list) was heard jointly with the first respondent's appeal against the order of dismissal of the counterclaim vide Civil Appeal No W-02(NCVC)(W)-3004-12 of 2012 (case No 19 on the hearing list). F

[31] The above two appeals were also heard together with the appeal in Civil Appeal No W-02(NCVC)(W)-2514-10 of 2012 (*Lee Soo You (trading under the name and style of AK Piling Construction) v Pembinaan Wincon Sdn Bhd* [2014] 5 MLJ 522) (case No 18 on the hearing list). G

[32] Upon reading the *rekod-rekod rayuan* and the written submissions of counsel for the respective appellants and respondents and upon hearing the oral submissions of counsel aforesaid in all three appeals, this court dismissed the appeals in cases Nos 17 and 18 with costs and allowed the appeal in case No 19 with costs. H

[33] This meant that the court had unanimously decided to dismiss the appeal of the appellant on its claim and allowed the appeal of the first respondent on their counterclaim. I

A [34] The appeal by Lee Soo You t/a AK Piling Construction (case No 18) was also dismissed.

B [35] The appellant in this appeal (case No 17) has filed its notice of motion for leave to appeal to the Federal Court. However, as the appellant (ie the respondent in case No 19) has not similarly applied for leave to appeal to the Federal Court the grounds of judgment herein will only be in respect of the decision made in case No 17.

C [36] For ease of reference and to avoid any confusion of the issues, separate grounds of judgment will be written in respect of case No 18.

GROUND OF DECISION

D [37] The court considered the following issues before arriving at its decision.

Issue 1: whether there was a repudiation of the two agreements by the first respondent

E [38] It was the appellant's case that as the first respondent did not instruct them to return to Sri Lanka to resume the RC Piles works between 2006 and 2008, the first respondent had therefore repudiated the two agreements and that the appellant had accepted the repudiation by filing the writ of summons and statement of claim.

F [39] We are of the view that the lack of instructions from the first respondent to the appellant to resume the works in Sri Lanka could not amount to a repudiation of the two agreements. The learned trial judge was quite correct to hold that 'mere silence' was insufficient to amount to a repudiation and that the two agreements still subsisted. For a contract to be repudiated there must have been an absolute refusal to perform, only then can the innocent party treat itself as being discharged. Here, in the present case there was no overt act committed by the first respondent to suggest that there was an express refusal by the first respondent to carry on with the two agreements and for the court to reasonably conclude that the first respondent no longer intended to be bound by the terms of the two agreements (see *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291).

I [40] Even with the disposal by the first respondent of its shares in Wincon Development (Ceylon) Pte Ltd to Metacorp Bhd it cannot be said that the first respondent did not intend to go through with the two agreements with the appellant. To begin with, the first respondent remained as a contracting party in the two agreements and the evidence adduced at trial seemed to suggest that

the first respondent was waiting to meet up with the appellant to discuss the resumption of the works. Unfortunately, the appellant did not do so. A

[41] As there was no question of the first respondent repudiating the two agreements, there could no issue of the appellant accepting the repudiation in turn. B

[42] Significantly, it will be noted in this case that the first respondent never once wrote or intimated to the appellant in any other form, that the first respondent was terminating the two agreements. Likewise, it will be noted, that the appellant never once wrote to the first respondent that it was accepting the first respondent's purported termination of the two agreements. C

[43] We are of the view that in the absence of any correspondence between the appellant and the first respondent on the alleged repudiation/termination of the two agreements, it cannot be gainsaid that the appellant had accepted the repudiation/termination by the filing of the writ of summons and the statement of claim. D

[44] In any event if the appellant was desirous of accepting the repudiation of the two agreements by the first respondent for whatever reason the appellant deemed fit, the acceptance ought to have been in writing by way of a letter or similar media as is the norm in the commercial world. It would be most unusual and undesirable for a party to accept a purported repudiation of a contract by merely filing a writ of summons and statement of claim in immediate response instead of by way of an exchange of views through correspondence as this may lead to unnecessary litigation. E F

Issue 2: whether the two agreements had been assigned to Metacorp Bhd by the first respondent without the consent of the appellant. G

[45] In para 9 of the memorandum of appeal, it was stated that 'the learned High Court judge erred in law and in fact when the learned High Court judge said that the Appellant has raised a point that the contracts had been assigned to a company known as Metacorp Bhd. The learned High Court judge erred in law and in fact that the learned High Court judge failed to appreciate sufficiently on the facts that there was no assignment of contracts in issue at all ...'. H

[46] The above ground of appeal was wholly fallacious as the learned trial judge in pp 9 and 10 of his grounds of judgment had clearly arrived at a contrary finding. In fact after referring to the point of assignment to Metacorp Bhd raised by counsel for the appellant, the learned trial judge held that the sale I

- A** of shares could not constitute an assignment of the appellant's contract with the first respondent without the appellant's consent, to amount to a termination of the two agreements (see *WH Electrical Marketing (M) Sdn Bhd v Jabatan Kerja Raya Malaysia & Ors* [2010] MLJU 1814; [2011] 4 CLJ 276 (CA) and *Malayawata Steel Bhd v Government of Malaysia & Anor* [1980] 2 MLJ 103; [1980] 1 LNS 45 (PC) on assignments).
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- C** [47] It was also the appellant's case that the first respondent by disposing of its shares in its subsidiary Wincon Development (Ceylon) Pte Ltd it had 'sold' off the project to a third party. Unfortunately, the appellant had failed to explain by evidence what exactly was meant by 'sold' and what was the real objection by the appellant to the sale of the shares. It was contended by the counsel for the appellant that the first respondent by selling off its interest in Wincon Development (Ceylon) Pte Ltd had divested itself from the project.
- D** We are of the view, with respect, that counsel for the appellant had failed to explain to the court how the 'divesting of its interest in Wincon Development (Ceylon) Pte Ltd' could have any impact on the two agreements between the appellant and the first respondent.

- E** [48] It will be noted that as far as the first respondent was concerned they had merely entered into a shares sale agreement to dispose of its shares to Metacorp Bhd. At no time was the shares sale agreement treated as an assignment of the Project to Metacorp Bhd nor could it be regarded as one.

- F** [49] The appellant appears to have disregarded the fact that even after the disposal of the shares by the first respondent the contracting parties in the two agreements remained the same namely, the appellant and the first respondent. There was no change caused to the contractual relationship between the appellant and the first respondent by virtue of the sale of the shares.
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- H** [50] As held by the learned trial judge the project was at all material times with the Sri Lanka company and that the two agreements with the appellant were 'still afoot'. The ensuing result of the shares sale agreement was that while the shareholding of the first respondent in Wincon Development (Ceylon) Pte Ltd was reduced, the first respondent still retained 25% of the shareholding in the company.

- I** [51] The appellant's contention of an assignment by the first respondent was obviously wrong. The learned trial judge was therefore correct to hold that there was no assignment and thus, there was no issue of the first respondent obtaining the consent from the appellant. The first respondent was not in breach of the two agreements and had in law and in fact not repudiated them.

[52] Thus, it can be seen that apart from the sale of the shares by the first respondent, impugned by the appellant, there was no other ground raised by the appellant to allege that the first respondent had in fact and in law repudiated the two agreements. A

[53] Further and in any event the sale of the shares took place on 6 February 2008 which was two years after the appellant had left the site in Sri Lanka in January 2006. B

Issue 3: whether the second and third respondents were liable for fraudulent trading under s 304 of the Companies Act C

[54] The appellant's complaint on this issue was that the second and third respondents being the only two directors of the first respondent, ought not to have sold the first respondent's shares in Wincon Development (Ceylon) Pte Ltd to Metacorp Bhd as by doing so the appellant had been deprived of the benefits of the two agreements in Sri Lanka. Again the appellant had, with respect, wholly failed to explain by evidence how the sale of the shares of the first respondent in Wincon Development (Ceylon) Pte Ltd could amount to fraudulent trading within the scope and ambit of s 304 of the Companies Act. D
The section reads: E

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs. F
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[55] The appellant must appreciate and realise that there is no provision in the two agreements prohibiting or restraining the first respondent from dealing with its shares in Wincon Development (Ceylon) Pte Ltd or that the first respondent must retain its controlling position in the company. H

[56] As stated earlier, the status quo of the project in Sri Lanka remained the same and the contractual relationship between the appellant and the first respondent remained unchanged. There was nothing in the appellant's evidence to suggest that the two agreements were not capable of performance simply because the first respondent's shares had been sold to Metacorp Bhd. I

- A [57] In the final analysis it would appear that the appellant had decided not to return to Sri Lanka to resume the RC Piles works not because of the sale of shares to Metacorp Bhd but because it was not financially viable for the appellant to do so.
- B [58] There was no evidence to support the contention of the appellant that 'the second and third respondents had maliciously and intentionally caused the first respondent to enter into contracts with an ulterior motive to commercially package the project for sale' (see ground No 10 in the memorandum of appeal).
- C There was no evidence to show that the business of the first respondent had been carried out with the intention to defraud its creditors or the creditors of any other persons for any fraudulent purpose. There was no evidence to show that there was any conspiracy between the second and third respondents to cause financial loss to the appellant. It was not in dispute that the first respondent had in fact assisted the appellant financially with advances and that the appellant had been fully paid on the five progress claim certificates (see *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569; [2003] 4 CLJ 68 (CA) on 'intent to defraud creditors' and 'for any fraudulent purpose').
- D
- E *Issue 4: whether the first respondent had proved its counterclaim against the appellant*
- [59] The appellant had claimed for damages against the first respondent for the conversion and detainment of its goods namely, machinery and equipment left at the site in Sri Lanka.
- F
- [60] The first respondent on the other hand counterclaimed for, inter alia, the machinery and equipment on the ground that the first respondent was the lawful owner of the same.
- G
- [61] This court had upon hearing the submissions, allowed the first respondent's appeal. As the appellant has not filed a notice of motion for leave to appeal to the Federal Court against the decision in this case (case No 19) it is assumed that the appellant is satisfied with the decision of the court.
- H

CONCLUSION

- I [62] In the result, the appeals in case Nos 17 and 18 were dismissed and the appeal in case No 19 was allowed with costs.

Appellant’s appeal dismissed and Wincon’s appeal allowed. A

Reported by Ashok Kumar

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